

# EXHIBIT D

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

AUDIBLE MAGIC CORPORATION	)	
	)	
<i>Counterclaim Plaintiff</i>	)	
	)	
v.	)	Civil Action No. 6:12-CV-0499- RWS-
	)	CMC
	)	
BLUE SPIKE, LLC, BLUE SPIKE, INC.	)	
and SCOTT A. MOSKOWITZ	)	
	)	JURY TRIAL DEMANDED
<i>Counterclaim Defendants.</i>	)	

**RULE 26 EXPERT REPORT OF ALAN RATLIFF**  
**ON BEHALF OF COUNTERCLAIM PLAINTIFF AUDIBLE MAGIC CORPORATION**  
**CONFIDENTIAL OUTSIDE COUNSEL ONLY**

This report is being provided pursuant to the agreements of the parties, the Court's scheduling and other orders, the Local Rules, and the Federal Rules of Civil Procedure and Evidence. Discovery is ongoing and if additional information that may be relevant to my opinions comes to light, or is discovered or produced by the parties near or after the date this report is signed, I reserve the right to supplement my opinions. Further, I may offer opinions at deposition or trial that are not disclosed in this report, but are related to the subjects of my opinions or my expertise and that are responsive to opinions in the reports or testimony of any witness that occurs near or after my report is signed or my deposition is taken. Further, I reserve the right to expand upon the opinions reflected in this report.

Respectfully submitted,

*Alan Ratliff*

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Alan Ratliff, CPA-CFF-CGMA-CPVA  
MPA-JD  
Dated: March 2, 2015

## **INTRODUCTION**

### **Scope of Assignment**

1. I have been retained by the law firm of Orrick, Herrington & Sutcliffe LLP on behalf of counterclaimant Audible Magic Corporation (“Audible Magic” or “Counterclaimant”) as an independent expert witness on damages and related topics. More specifically, my opinions relate to the damages that may be due to Audible Magic from counter-defendants Blue Spike, LLC (“BSLLC”), Blue Spike, Inc. (“BSI”) and Scott A. Moskowitz (“Mr. Moskowitz”) (collectively “Blue Spike” or “Counter-Defendants”).<sup>1</sup> Specifically, I have been asked to determine the amount of damages, if any, due to Audible Magic assuming Audible Magic establishes Blue Spike is liable for the various causes of action alleged.<sup>2</sup>

### **Qualifications**

2. I am a Certified Public Accountant and a licensed attorney in Texas, and I am nationally certified in patent valuation, global management accounting and financial forensics. I am a member of the Bars of the State of Texas, the U.S. Supreme Court, the Eastern District of Texas, and other federal appellate and district courts, clerked for the Hon. J. Smith Henley of the U.S. Court of Appeals for the Eighth Circuit, and am a past chapter president of the Federal Bar Association.
3. I hold undergraduate and graduate degrees in business and accounting from Baylor University (magna cum laude, published theses in accounting/economics), and my Juris Doctorate from Southern Methodist University (cum laude, Law Review, Order of the Coif, published article on tax/economic policy), totaling more than 120 hours of economics and commercial studies. I have 25 years of legal, accounting and economic consulting experience including as National Practice Leader for Intellectual Property Litigation Services at Ernst & Young and a former attorney with Weil, Gotshal & Manges LLP.
4. I have worked on more than a 100 projects involving patents and licensing as a consultant, and have testified at trial as a financial expert 40 times, about half involving patent or licensing issues and a dozen of those in the Eastern District of Texas. In addition to serving

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<sup>1</sup> Based on deposition testimony given by Blue Spike’s founder (Mr. Moskowitz), [REDACTED]

<sup>2</sup> Audible Magic Corporation’s Answer to Blue Spike LLC’s First Amended Complaint for Patent Infringement and Counterclaims Against Blue Spike LLC, Blue Spike, Inc. and Scott A. Moskowitz filed April 18, 2014 (“Counterclaim”) at 43-46, 49-53.

[illegible]

<sup>114</sup> Moskowitz deposition Vol. 6 at 1501-1510, Exhibit 33 (BLU0445056).

13. Moskowitz deposition Vol. 6 at 1502-1503. Mr. Moskowitz also testified that the document was provided by his accountants and he simply assumed it was “true and correct.”

<sup>116</sup> Moskowitz deposition Vol. 6 at 1503.

<sup>117</sup> StoneTurn Workpaper 1.

118

60. [REDACTED]
61. [REDACTED]
62. [REDACTED]

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<sup>119</sup> Alabama Law Review, Volume 64, “The Rise of Contingent Fee Representation in Patent Litigation,” Schwartz, David L., 2012, p. 343.

<sup>120</sup> Moskowitz deposition Vol. 6 at 1505, 1507-1508.

<sup>121</sup> Moskowitz deposition Vol. 6 at 1505, 1507-1508.

<sup>122</sup> Moskowitz deposition Vol. 6 at 1511. [REDACTED]

<sup>123</sup> Complaint at 2.

<sup>124</sup> Google Inventor Search: Scott A. Moskowitz,  
<https://www.google.com/search?tbo=p&tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowitz%22&hl=en&tbs=ptso:us,sbdo:1&tbm=pts>.

<sup>125</sup> Google Inventor Search: Scott A. Moskowitz,  
<https://www.google.com/search?tbo=p&tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowitz%22&hl=en&tbs=ptso:us,sbdo:1&tbm=pts>.

64.

<sup>126</sup> Moskowitz deposition Vol. 6 at 1471, 1510, 1512.

<sup>127</sup> Moskowitz deposition Vol. 6 at 1508, 1510. Mr. Moskowitz described this as [REDACTED].”

128 Moskowitz deposition Vol. 6 at 1502-1503. Mr. Moskowitz also testified that the document was provided by his accountants and he simply assumed it was “true and correct.”

<sup>129</sup> Moskowitz deposition Vol. 6 at 1504.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
69. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
70. [REDACTED]
- [REDACTED]
- [REDACTED]

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<sup>130</sup> See, e.g., Alabama Law Review, Volume 64, “The Rise of Contingent Fee Representation in Patent Litigation,” Schwartz, David L., 2012, p. 360.

**Damages Conclusion**

71. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] I reserve the right to supplement my report to compute additional damages on these or other (including subsequent) licenses or settlements related to the Abstract Patents.

**Other**

73. If the Court plans to submit pre-judgment interest to the jury or should otherwise request my assistance in computing pre-judgment interest, I am prepared to do so.

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<sup>131</sup> StoneTurn Workpaper 3.2.



**Audible Magic Corporation v. Blue Spike, LLC, et al.**  
**StoneTurn Exhibit B - Documents Reviewed**

**Legal Filings (cont.)**

Scott Moskowitz's Reply in Response to Defendant Audible Magic's First Amended Counterclaims filed 9/5/14  
Audible Magic Corporation's and its Customers' Reply in Support of their Motion for Partial Summary Judgment Based on License filed 9/15/14  
Plaintiff Blue Spike LLC's Sur-Reply to Audible Magic Corporation's and its Customers' Motion for Partial Summary Judgment Based on License filed 9/25/14  
Report and Recommendation of the United States Magistrate filed 10/16/14  
Order Granting Plaintiff's Motion to Modify the Scheduling Order filed 10/16/14  
Memorandum and Opinion filed 10/16/14

**Produced Without Bates Label**

[REDACTED]

Technology\_Tutorial\_re\_Audible\_Magic's\_308\_patent  
Technology\_Tutorial\_re\_four\_Blue\_Spike\_patents

**Other**

[REDACTED]

Alabama Law Review, Volume 64, "The Rise of Contingent Fee Representation in Patent Litigation," Schwartz, David L., 2012  
Audible Magic Corporation: Private Company Information - Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=936050>  
BusinessWire, "Audible Magic Launches Video Fingerprint ACR Technology," dated 6/24/13  
Google Inventor Search: Scott A. Moskowitz, <https://www.google.com/search?tbo=p&tbm=pts&hl=en&q=ininventor:#q=ininventor:%22scott+a.+moskowicz%22&hl=en&tbs=ptso:us,sbdo:1&tbm=pts>  
<https://twitter.com/audiblemagic>  
Network-1 Technologies, Inc. Form 10-K dated 12/31/12  
Network-1 Technologies, Inc. Form 10-K dated 12/31/13  
Practical Cryptography, "Mel Frequency Cepstral Coefficient (MFCC) Tutorial" [practicalcryptography.com/miscellaneous/machine-learning/guide-mel-frequency-cepstral-coefficients-mfccs/](http://practicalcryptography.com/miscellaneous/machine-learning/guide-mel-frequency-cepstral-coefficients-mfccs/)  
Public Access to Court Electronic Records (PACER)  
[REDACTED]  
Tech News and Analysis, "Audible Magic Raises Nearly \$1.3 Million in Funding," <http://gigaom.com/2009/08/21/419-audible-magic-raises-nearly-1-3-million-in-funding/>  
U.S. Patent No. 5,918,223  
U.S. Patent No. 7,346,472  
U.S. Patent No. 7,660,700  
U.S. Patent No. 7,949,494  
U.S. Patent No. 8,214,175  
USPTO Assignments for U.S. Patent No. 7,346,472 and Continuations  
Washington Lawyers for the Arts, "Contingency Fee Lawyers in Intellectual Property," [thewla.org/contingency-fee-lawyers-in-intellectual-property/](http://thewla.org/contingency-fee-lawyers-in-intellectual-property/)

The following 7 pages of charts were omitted due to reliance on confidential financial information.